No. 89-48

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In the

Supreme Court of the United States

OCTOBER TERM, 1989

Dewayne Hulsey ..... *Petitioner*

V.

Willis Sargent, Warden, Cummins Unit,
Arkansas Department of Correction ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Willis Sargent, responds to the petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

JURISDICTION

Respondent acknowledges that this Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

I.

THE PRESUMPTION OF CORRECTNESS WAS PROPERLY APPLIED TO THE TRIAL COURT'S DECISION TO EXCUSE JUROR MARY CREAMER UNDER *WITHERSPOON V. ILLINOIS.*

Hulsey argues that the decision of the Eighth Circuit Court of Appeals was in error because it applied the presumption of correctness to the trial court's decision to excuse prospective juror Mary Creamer for cause based upon *Witherspoon v. Illinois*, 391 U.S. 510 (1967). He contends that the Eighth Circuit's decision is in conflict with this Court's decisions in *Gray v. Mississippi*, 481 U.S. 648 (1987); *Cabana v. Bullock*, 474 U.S. 376 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985); *Townsend v. Sain*, 372 U.S. 293 (1963) and *Rogers v. Richmond*, 365 U.S. 534 (1961). Respondent Sargent denies that the Eighth Circuit's opinion conflicts in any way with the decisions of this Court and urges the Court to deny the Petition for Certiorari.

The gist of Hulsey's argument is that the trial court applied an incorrect legal standard in excusing Mrs. Creamer at his trial in 1975 when it relied on *Witherspoon's* footnote 21. Contrary to Hulsey's suggestion that all parties have agreed that the trial court applied the wrong standard, the respondent has always argued that the trial court, sitting in 1975, properly applied *Witherspoon's* footnote 21 in excusing Mrs. Creamer. While it is true that that standard has since been modified as articulated in this Court's opinion in *Wainwright v. Witt*, 469 U.S. 412 (1985), in 1975 *Witherspoon's* footnote 21 was the prevailing standard used in state and federal courts in excusing jurors in capital cases based on their opposition to the death penalty. This Court recognized this fact in *Witt* and noted that it too had referred to the language in *Witherspoon's* footnote 21 in later opinions and to similar language in *Witherspoon's* footnote 9. *Id.*, 469 U.S. at 418-19.

Until 1980, when *Adams v. Texas*, 448 U.S. 38 (1980) was decided, the various trial courts had no reason to apply any standard other than that found in footnote 21 and not until 1985 when *Witt* was decided, was it clear that *Witherspoon's* footnote 21 was no longer the correct standard.

The Eighth Circuit concluded that in 1975, the trial court acted properly in applying *Witherspoon's* footnote 21 in excusing Mrs. Creamer, that the presumption of correctness applied to this determination by the trial court and found that the trial court's finding was fairly supported by the record. App. A.

A brief review of the *Witherspoon* issue will be helpful in resolving the questions before the Court. In 1968, in *Witherspoon v. Illinois, supra*, this Court was faced with the issue of whether Illinois' procedure for excusing jurors with qualms about capital punishment violated a criminal defendant's right to an impartial jury. The Court concluded that jurors could not be excused because they voiced general objections to the death penalty. It was clear from *Witherspoon* that jurors could only be excused if their beliefs about capital punishment would prevent them from considering the death penalty as a possible punishment. *Witherspoon* has been described as "limitation on the State's power to exclude" jurors in capital cases. *Adams*, 448 U.S. at 48. However, the limitation was relaxed in *Adams* and *Witt*.

In 1980, the Court was again faced with the *Witherspoon* issue in *Adams v. Texas*, 448 U.S. 38 (1980). There the Court concluded that:

> This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a jury in accordance with his instructions and his oath.

Id., 448 U.S. at 45. Thus, the language used in *Adams* was very different from the language of footnote 21.

In 1985, in *Wainwright v. Witt, supra*, the Court finally clarified the standard for exclusion of jurors in capital cases. The Court stated:

> We therefore take this opportunity to clarify our decision in *Witherspoon*, and to reaffirm the above-quoted standard from *Adams* as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing with *Witherspoon's* reference to "automatic" decision making, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.

Witt, 469 U.S. at 424-25 (Footnotes omitted).

The idea that *Witherspoon's* limitation of the State's power to exclude was relaxed in *Adams* and *Witt* is important. The respondent notes that if Mrs. Creamer was properly excluded under *Witherspoon*, there can be little question that she also would have been properly excluded under the *Adams-Witt* standard. This undercuts Hulsey's argument that the presumption of correctness may not be applied to the trial court's decision to excuse Mrs. Ceramer under *Witherspoon's* footnote 21. In footnote 6 of his petition, Hulsey attempts to rely on rules of logic to argue that jurors excludable under *Witherspoon* would not necessarily be excluded under *Adams* and *Witt*. He argues this is so because *Witherspoon's* footnote 21 did not focus on a juror's ability to follow her oath and her instructions. He cites no authority to support his position. Moreover, the respondent asserts that his logic is flawed. A juror who would automatically vote against the imposition of the death penalty without regard to the evidence that might develop at the trial by definition is a juror who could not follow her oath and her instructions.

Prospective juror Mary Creamer made it unmistakably clear that she would automatically vote against the death penalty in response to a question at voir dire. The question and answer were as follows:

> MR. RAFF: They have that choice. Now, what I'm trying to find out, even though you think he is guilty, *would you automatically vote against the imposition of the death penalty without regard to any evidence that might develop in the trial of the case?*
>
> MRS. CREAMER: I believe I would, yes, sir, I believe I don't want to take a life.

App. A at 11a (emphasis added). Thus, the record clearly supports the trial court's conclusion that Mrs. Creamer should be excused for cause under the authority of *Witherspoon*. Fair support in the record is all that § 2254(d)(8) requires for the presumption of correctness to attach.

The District Court suggested that the "unmistakably clear" test of *Witherspoon* was not satisfied in the record of Mrs. Creamer's voir dire because "the *Witherspoon* question was put to Mrs. Creamer twice and only once did she answer that she would automatically vote against the death penalty." App. D at 21a.

Mrs. Creamer was the type of vacillating juror the Supreme Court referred to in *Witt* when it noted that "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.' " *Id.*, 469 U.S. at 424-25.

Before a federal court may set aside a state court's findings of fact, it must do more than simply disagree with the state court, "it must conclude that the state court's findings lacked even 'fair support' in the record." *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). Conversely, when the State findings have the necessary support, the statute requires "the federal courts to face up to any disagreement as to the facts and to defer the State court . . . ." *Sumner v. Mata*, 455 U.S. 591, 598 (1982) (per curiam). The federal role is simply to ascertain whether the State court's findings have fair support in the record.

The concept of the presumption of correctness embodied in 28 U.S.C. § 2254(d) had its origins in *Townsend v. Sain*, 372 U.S. 293, 316 (1963). Section 2254(d) codified the concepts articulated in *Townsend*. The presumption of correctness was further addressed and clarified in *Sumner v. Mata*, 449 U.S. 539 (1981) (Sumner I) and *Sumner v. Mata*, 455 U.S. 591 (1982) (Sumner II). Again, in *Marshall v. Lonberger*, 459 U.S. 422 (1983), the Court addressed the applicability of the presumption of correctness to a state court's findings. These cases give broad guidelines concerning the presumption and when it applies.

In Hulsey's case, the District Court simply disagreed with the trial court's conclusions as to Mrs. Creamer's

qualifications to serve as a juror in Hulsey's case. The findings entered by the District Court in 1981, the first time it vacated Hulsey's death sentence, make this clear. The District Court substituted its own judgment for that of the trial court. The Eighth Circuit acknowledged as much in its opinion remanding this case for reconsideration. App. E at 24a-25a. Upon remand, the District Court again vacated Hulsey's death sentence because it still disagreed with the trial court's conclusion. This time though, the District Court suggested that it was doing so because the trial court's decision to exclude Mrs. Creamer did not have fair support in the record and because it believed the wrong legal standard had been applied. App. D at 19a-21a.

However, the respondent asserts that the record of the voir dire amply supports the trial judge's decision that she would be excused because of her views on capital punishment. A summary of Mrs. Creamer's voir dire follows: At first, Mrs. Creamer stated that she did not have any personal belief about the propriety of the death penalty. App. A at 7a. She then indicated that she did not know if she was against the death penalty or whether she could vote for it. She followed that up by stating that if the person was guilty of a crime that deserved the death penalty, she could vote for it. App. A at 7a-8a. She expressed the belief that robbery/murder justified the death penalty. App. A at 8a. She then stated that she guessed that she could vote for the death penalty in a robbery/murder situation. She believed that she could. App. A at 8a-9a. Her answers were clearly tentative. On further questioning, she stated that she could not "do it" [vote for the death penalty]. App. A at 9a-10a. Mrs. Creamer then expressed the belief that if the evidence were "as such," she could not vote against it, but she would not want to vote for it. She then admitted telling the prosecutor that she could not vote for the death penalty. She further stated that she could not say that if any person was found guilty that she could set [the penalty at death]. She would not want to be the one. App. A at 10a-11a. Finally, Mrs. Creamer stated that she believed that she

would automatically vote against the imposition of the death penalty because she would not "want to take a life." App. A at 11a.

We know from *Witt* that a trial judge's ability to assess credibility and demeanor are crucial to assessing the existence of bias. Even if Mrs. Creamer did give inconsistent answers, the trial judge was the appropriate person to determine her ability to fairly consider the issue of imposing a death sentence. The District Court attempted to steal this responsibility from the trial judge without any justification. Certainly it cannot be said that there is not fair support in the trial record for the trial judge's conclusion.

The petitioner relies on *Gray v. Mississippi*, 481 U.S. 648 (1987) for the proposition that the presumption of correctness cannot apply in his case because the trial court applied the wrong standard in excusing Mrs. Creamer. *Gray* holds simply that a *Witherspoon* error can never be considered harmless. Admittedly, in footnote 10 of the *Gray* opinion, this Court indicated that the trial court's findings in that case were not entitled to the deference generally owed to state court findings of fact because the trial court's findings were dependent on an apparent misapplication of federal law. However, the *Gray* case is in no way analogous to the case at bar. In *Gray*, the trial court granted an excusal for cause on *Witherspoon-Adams-Witt* grounds that was clearly not justified based on the voir dire responses given by the juror. The trial court apparently granted the excusal for cause because it had erroneously denied valid cause challenges as to five or six previous jurors.

Hulsey's reliance on *Cabana v. Bullock*, 474 U.S. 376 (1976); *Enmund v. Florida*, 458 U.S. 782 (1982); *Townsend v. Sain*, 372 U.S. 293 (1963); and *Rogers v. Richmond*, 365 U.S. 534 (1961) is simply misplaced. Nothing in any of those cases in any way conflicts with the Eighth Circuit's decision in Hulsey's case. Hulsey has strained to even argue that they do conflict with the Eighth Circuit's opinion.

In the case at bar, the trial court relied on the test stated in *Witherspoon's* footnote 21 for determining whether Mrs. Creamer should be excused. That was the appropriate standard in 1975, the year of Hulsey's trial. There was no misunderstanding or misapplication of federal law by the trial court and the record supports the trial court's decision to excuse Mrs. Creamer. Therefore, the Eighth Circuit correctly applied the presumption of correctness to the trial court's decision to excuse Mrs. Creamer. As such, this Court should decline to exercise its discretion to review this case.

II.

THE TRIAL COURT WAS NOT REQUIRED TO DETERMINE SPECIFICALLY WHETHER A PROSPECTIVE JUROR'S OPPOSITION TO THE DEATH PENALTY WILL PREVENT HER FROM CARRYING OUT HER OATH.

Hulsey argues that this Court did not decide, in its opinion in *Gray v. Mississippi*, 481 U.S. 648 (1987), whether a prospective juror must be asked directly if she could set aside her scruples and follow her oath. He apparently raises this issue because he believes that the trial court hearing his case in 1975 was required to make such an inquiry. He suggests that the resolution of this issue is critical so that state and federal courts will know in future cases whether such a foundation must be laid.

The respondent asserts that this Court need not grant certiorari because it is not necessary to the resolution of Hulsey's case. It seems clear that in 1975, a trial court was not required to make a *specific* finding that a juror's views on capital punishment would interfere with her oath as a juror. This would have required the court sitting in 1975 to have anticipated this Court's decisions in *Adams* in 1980 and *Witt* in 1985. Moreover, it seems obvious that *Witherspoon's* footnote 21 implicitly required a finding that

the prospective juror would be unable to follow her oath before she could be excluded for cause. *Witherspoon* required the trial judge to determine whether the juror's beliefs about capital punishment would prevent her from considering the death penalty as a possible punishment. Since the court would instruct the jurors to consider death as a punishment, such a juror would necessarily have been unable to follow her oath and the court's instructions.

Hulsey has failed to provide any reason for the Court to grant certiorari as to this issue.

III.

THE EIGHTH CIRCUIT PROPERLY APPLIED *ADAMS* AND *WITT* TO THE PETITIONER'S CASE.

Hulsey argues, in essence, that the Eighth Circuit erred in applying the presumption of correctness outlined by *Witt* to his case and in *not* applying to his case the relaxed standard for exclusion of jurors articulated in *Adams* and clarified in *Witt*.

As has already been outlined in this brief, the only standard for exclusion of jurors available to the trial court in 1975 was that established in *Witherspoon*. Thus, it is not clear how or why Hulsey believes the trial court could have applied a different standard.

On the other hand, the reasons for applying the presumption of correctness to a trial judge's findings with respect to the qualifications of certain jurors to be seated in a particular case include "determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Witt*, 469 U.S. at 428. The deference accorded such a determination does not depend necessarily on which standard is used but rather on whether the standard is applied appropriately by the fact finder. The respondent can perceive no reason why the presumption should not be applied to the findings in Hulsey's case.

As has already been pointed out in this brief, the trial court relied on the standard of *Witherspoon's* footnote 21, the only standard available at that time. The trial judge sought to determine whether Mrs. Creamer had made it unmistakably clear that she would automatically vote against the death penalty no matter what the evidence revealed. Moreover, the trial record contains fair support for the trial court's conclusion that Mrs. Creamer would automatically vote against the death penalty. No doubt this was unmistakably clear to the trial judge.

The respondent can perceive no constitutional deficiency in retroactively applying this Court's determination that the presumption of correctness attaches to a trial court's determination of a juror's qualifications and in not retroactively applying the standard for exclusion of jurors articulated in *Adams* and *Witt*. However, as pointed out previously, the respondent asserts that any juror subject to exclusion under *Witherspoon* would also be excludable under the *Adams-Witt* standard because it constituted a relaxation of the standard for exclusion of jurors by retreating from the automatic decision making required by *Witherspoon*.

While it is true that this Court has not addressed whether and to what extent *Witt* should be applied retroactively, the petitioner has failed to identify any split among the circuit courts of appeals or any inconsistencies in the application of *Witt* that might compel this Court to address the issue at this time.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on Writ of Certiorari will only be granted when there are special and important reasons therefor. This case contains no issues worthy of such review. The points raised by the petitioner do not establish that Constitutional error has occurred. Therefore, for these reasons and for the reasons and authorities cited in Respondent's Brief in Opposition to the Petition for Writ of Certiorari, respondent respectfully prays that this Court deny the petitioner's Writ of Certiorari.

Respectfully submitted,

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